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FILED
MAR 24 1966
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 1148

OMAR SCHMEUSSER,
Petitioner,

vs.

NICHOLAS DE B. KATZENBACH, ATTORNEY GENERAL OF THE UNITED STATES; DEAN RUSK, AS SECRETARY OF STATE OF THE UNITED STATES OF AMERICA; THE UNITED STATES OF AMERICA; AND THE GULF OIL CORPORATION, A CORPORATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

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March, 1966

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

Petitioner, Omar Schmeusser, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals, Tenth Circuit, entered in this case on January 7, 1966.

OPINIONS BELOW

No opinion was written by the trial court when summary judgment was entered for the Respondents. The opinion of the Court of Appeals is printed in Appendix A as it is not officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered January 7, 1966. A petition for rehearing was not filed. The jurisdiction of this Court is invoked under Title 28, U.S.C.A., Section 1254(1) and Rule 19 of the Supreme Court of the United States.

QUESTIONS PRESENTED

1. Is the doctrine of res judicata a defense to an action for relief under Rule 60(b), Federal Rules of Civil Procedure?

2. Whether as applied to this petitioner the Summary judgment by the Court of Appeals, Tenth Circuit, violates his rights guaranteed by the Fifth Amendment to the Constitution of the United States, in that it is a taking of private property without due process of law and without just compensation.

3. Is it prime error to grant a motion for summary judgment in favor of the defendants when after the taking of evidence the relief could be granted to the plaintiff under Rule 60(b), Federal Rules of Civil Procedure?

4. An action under Rule 60(b), Federal Rules of Civil Procedure, presents a genuine issue of a material fact and a motion for summary judgement is not proper.

5. Is the taking of a citizen's property three years after World War II ended and one year after he was denaturalized under the provision of the statute now held to be unconstitutional so unjustifiably discriminatory as to be violative of the due process clause of the Fifth Amendment to the Constitution of the United States?

6. Is a vesting order valid which was issued *after* a person was denaturalized pursuant to the statute which was later held unconstitutional in the case of *Schneider* v. *Rusk*, 1964, 337 U.S. 163, 12 L. Ed. (2d) 218, 84 S. Ct. 1187.

7. As applied to the rights of the Petitioner Title 50, U.S.C.A. App., Section 2 *et seq.*, is so unjustifiably discriminatory as to be violative of the rights guaranteed to the petitioner by the Fifth Amendment to the Constitution of the United States of America.

STATUTE INVOLVED

The statutory provisions involved are Title 8, U.S.C.A. 804(B) and Sec. 1484 A (1), Rule 60(b), Federal Rules of Civil Procedure. Title 50, U.S.C.A. App., Sec. 2. They are printed in Appendix B.

STATEMENT

Omar Schmeusser, petitioner, and successor in interest of his father, Carl Anton Schmeusser, now deceased, instituted this action to recover real and personal property wrongfully vested by the Attorney General of the United States. The Complaint, answers and respondents' summary judgment motions constitute the pleadings. Briefs were submitted to the court and by letter, Chief Judge Chandler advised the parties that he had sustained the defendants' motions for summary judgment, which order was entered

May 5, 1965. Petitioner filed a motion to vacate the summary judgment and to grant appellant a trial (R. 121) which was overruled (R. 127) on June 4, 1965. The Court of Appeals affirmed the trial court's summary judgment January 7, 1966 (Appendix A).

Omar Schmeusser will be known as petitioner. Carl Anton Schmeusser will be known as Carl Schmeusser. The United States and the Gulf are the respondents.

Carl Schmeusser was born in Germany on June 9, 1882. He emigrated to the United States on or about May 8, 1908, and became a naturalized citizen of the United States at Kansas City, Missouri, on February 5, 1919.

Carl Schmeusser was employed as a decorator in Oklahoma City and acquired real and personal property as an American Citizen while working in the United States for over 20 years and it is this property which was vested by the Government and the real estate sold to others which the petitioner, Omar Schmeusser, seeks to recover in this action. In 1933, Carl Schmeusser, then single, returned to Germany for further study and married (R. 263) a German Citizen in 1939 and the petitioner, Omar Schmeusser, was born of this marriage, and is an American Citizen by birth. In April, 1940, Carl Schmeusser returned to the United States to look after this property and remained here until November, 1940, when he returned to Germany and became ill with heart condition and had to remain there.

On July 30, 1946, the United States Consul at Stuttgart, Germany, asked Carl Schmeusser if he wished to return to the United States, however, due to ill health he was physically unable to leave at that time.

Thereafter, on April 22, 1947, Carl Schmeusser was issued a certificate of loss of nationality due to his failure to return to the United States prior to October 14, 1946,

as required by Section 404 of the Nationality Act of 1940 (Title 8, U.S.C.A., Sec. 804). This certificate was approved by the United States Department of State on June 25, 1947.

A statute cannot expatriate citizens on the basis of foreign residence where it is not the foreign residence itself which causes difficulty but some particular conduct or situation applicable to particular persons or groups of persons. *Bailey* v. *Alabama,* 219 U.S. 219, 55 L. Ed. 191, 31 S. Ct. 145; *Tot* v. *United States,* 319 U.S. 463, 87 L. Ed 1519, 63 S. Ct. 1241; *Heiner* v. *Donnan,* 285 U.S. 312, 76 L. Ed. 772, 52 S. Ct. 358.

Expatriation imposed on a naturalized citizen under a penalty for residence abroad constitutes a cruel and unusual punishment, in violation of the Eighth Amendment. *Trop* v. *Dulles,* 356 U.S. 86, 2 L. Ed. (2d) 630, 78 S. Ct. 590.

Approximately one year later on March 15, 1948, vesting order No. 10907 (R. 141) was issued by the office of alien property of the Department of Justice, vesting all of Carl Schmeusser's real, personal, and mineral properties in Oklahoma and New York in the Attorney General of the United States.

Carl Schmeusser sued Tom Clark (R. 138) then Attorney General, as vesting officer in 1949, in the Federal Court in Oklahoma City to cancel the vesting order which was based on loss of citizenship by reason of residence in Germany under a statute, Title 8, U.S.C.A., Section 804 (B).

On May 31, 1951, a judgment (R. 188) was entered in the United States District Court for the Western District of Oklahoma, denying the return of his property consisting of cash, real and personal property, and oil minerals, which had been confiscated by the vesting order. No appeal was had because the United States government had confiscated the Petitioner's money. Carl Schmeusser was sick in Ger-

many and unable to travel and all his property was vested. The Government took his money, personal property and sold his real estate. Carl Schmeusser died in 1953 and his estate was probated in Germany and he left his wife and one son, Omar Schmeusser, the petitioner, as his heirs and the mother passed her interest in this property to Omar Schmeusser, her son. Omar Schmeusser is an American Citizen by being the son of an American Citizen, Carl Schmeusser. He is living in the United States and was recently discharged from the United States Army.

This complaint is based on the fact that the Title 8, U.S.C.A., 804 (B) (1947), which was in force and upon which the vesting order against Omar Schmeusser's father, Carl Schmeusser, was based, has been declared unconstitutional, *Schneider* v. *Rusk* (*supra*), and therefore Respondent is entitled to a judgment of this court vacating the order and the judgment entered in Case #4233 Civil Case *Schmeusser* v. *Tom Clark*. United States District Court for the Western District of Oklahoma. On March 9, 1964, after the decision of *Schneider* v. *Rusk* the Foreign Service of the United States of America notified Carl Schmeusser by letter that his loss of citizenship was void.

REASONS FOR GRANTING THE WRIT

1.

The decisions of the trial court and the Court of Appeals, Tenth Circuit, are repugnant to and in conflict with prior decisions of the Supreme Court of the United States, and deprive the plaintiff of his property without either due process or compensation.

2.

As applied to this Petitioner and Carl Schmeusser, Title 50, U.S.C.A. App., Section 1 *et seq.*, is repugnant to

and in conflict with the Fifth Amendment to the Constitution of the United States.

3.

The decision of this court in *Schneider* v. *Rusk* (*supra*) and the implications of its application to Title 50, U.S.C.A., App., Sec. 1, raises important constitutional questions which warrant review by this court.

4.

That as applied to this Petitioner Title 50, U.S.C.A., App., Section 1 *et seq.*, is an unwarranted exercise by Congress of the War Powers granted by the Constitution of the United States of America.

5.

That as the present world situation has evolved this court must impose limitations on the "end of war" (Title 50 App., Sec. 2) which limitations are inherent within the Constitution of the United States.

6.

Taken together and collectively the reasons for granting the writ compel this court to review the action of the trial court and Court of Appeals.

PROPOSITION I

The Trial Court Deprived the Petitioner of Due Process and a Trial in Sustaining the Respondents' Motions for Summary Judgment and Erred in Denying Petitioner's Motion to Vacate the Summary Judgment and Thereby Deprived Petitioner of His Property Without Just Compensation.

The respondents filed motions for summary judgment in this case, which were sustained and a judgment entered

in favor of the defendants, May 5, 1965. There were no depositions taken and no affidavits filed in this case. The motions were sustained on the basis of the pleadings alone. The pleadings consisted of the complaint and exhibit of counsel, and the various motions of the respondents. The answers of the defendants controvert the allegations of the complaint and create material questions of fact upon which a jury trial should be granted.

A summary judgment should not be granted if there is a genuine issue of material fact to be determined by granting the parties a trial. We submit that the pleadings created a genuine issue of a material fact and that the defendants were not entitled to judgment as a matter of law. No matter how apparent it is that a party is unlikely to prevail upon trial is not sufficient basis for refusing to him his day in court with respect to issues which are not shown to be a sham, frivolous, or so unsubstantial that it would obviously be futile to try them. *Union Transfer Co.* v. *Riss & Co.*, (C.A. 8th) 218 F. (2d) 553; *Parmelee* v. *Chicago Eye Shield Co.*, (C.A. 8th) 157 F. (2d) 582; *Chappell* v. *Goltsman*, (C.A. 5th) 186 F. (2d) 215. See also *Harl* v. *Acacia Mutual Life*, (C.A. D.C.) 317 F. (2d) 577.

Rule 56 (c), FRCP, placed the burden of demonstrating the nonexistence of any genuine fact issue upon the moving party and requires that all doubt be reasoned against him. *Walling* v. *Fairmont Creamery*, 139 F. (2d) 318, 322. If the pleadings raise a genuine issue of fact material to the dispute between two parties a summary judgment should not be entered *Nickolson* v. *Nestle*, (5th Cir.) 107 F. (2d) 17.

It is only where it is perfectly clear that there are no issues in the case that a summary judgment is proper, and even in cases where the court is of opinion that he will have to direct a verdict for one party or the other on the issues

that have been raised, the courts ordinarily hear evidence and direct verdict rather than attempt to try a case in advance on motion for a summary judgment. *Kirkpatrick* v. *Consolidated Underwriters*, (C.A. 8th) 227 F. (2d) 228.

It is well settled that a summary judgment can be granted only if there is no genuine dispute as to any material fact, and such requirement must be strictly construed to ensure that factual issues will not be determined without benefit of a trial. *United States* v. *United Scenic Artists, etc.*, (D.C. N.Y. 1961) 27 F.R.D. 499.

This present action is in effect an action for relief from a previous judgment and the provisions of Rule 60 (B). The very nature of Rule 60 (B) for relief presents a question of fact which should be determined by a trial and not by motion for summary judgment. The ultimate question to be determined is the Petitioner in this case entitled to relief from the previous judgment. This goes deeper than a defense of res judicata. If the doctrine of res judicata was applied to relief under Rule 60 (B), as it was in this case, then the Rule would be a complete nullity. This was clearly not the intention to create a remedy which afforded no relief.

Summary judgment should be granted in only exceptional cases and this is particularly true in an action to correct a judgment which becomes unjust by subsequent enlightened changes in the law.

PROPOSITION II

The Doctrine of Schneider v. Rusk (Supra) As Applied to This Petitioner Raises Important Constitutional Questions Which Warrant Review by This Court.

In July, 1946, Carl Schmeusser was asked if he wished to return to the United States. He indicated that he was,

however, he had a heart condition and was not physically or financially able to return at that time. This apparently was all that was needed for the state department to decide that he should be deprived of his citizenship which was done on April 22, 1947. Carl Schmeusser was expected by this government to leave his family and return to this country in ill health. On March 15, 1948, it was decided that by his failure to immediately return to this country he was and had been an enemy alien and was divested of all his property in the United States per vesting order 10907.

It is important that the vesting order was not issued until he had been divested of his citizenship rights, by a law which has been declared unconstitutional by this court in *Schneider* v. *Rusk*, 377 U.S. 163, 12 L. Ed. (2d) 218, 84 S. Ct. 1187 (1964).

In 1949, Carl Schmeusser obtained counsel, who without fee or expenses, attempted to obtain some redress for this wrong by filing an action to recover his property, which was unsuccessful in the trial court.

The all powerful government, with unlimited resources at its disposal, imported witnesses from Germany for his trial, and when Carl Schmeusser attempted to use his own money to pursue his cause of action the government refused to release a dollar of these funds and Carl Schmeusser's right of appeal was taken from him, as he had no funds with which to employ counsel or perfect his appeal, and his money was vested in his government.

The paramount question of fact presented by the complaint is the effect of his loss of nationality as the basis on the proceeding which divested him of his real and personal property.

As the statute under which Carl Schmeusser lost his citizenship has been determined unconstitutional and void,

then Carl Schmeusser, in fact, never was deprived of his citizenship and was at all times until his death a United States Citizen.

Previously this Title 8, U.S.C.A., Section 1484 (a) (1), had been held constitutional in *Laprides* v. *Clark*, 176 F. (2d) 619, cert. denied 94 L. Ed. 527, until *Schneider* v. *Rusk*, *supra*. In considering the summary judgment and motion to dismiss all of the allegations of the complaint must be considered to be true. We presume that our government does not take its citizens' property on technicalities, nor treat one citizen different from the other. That the rights of the native born and the naturalized citizen are of the same dignity and co-extensive and both have the protection of the Constitution. Congress cannot unjustifiably enlarge or abridge the rights of naturalized citizens.

Does a fiduciary relationship exist between the government and a citizen—especially when the government seizes the citizen's property, does not furnish him counsel or let him use his own money to appeal his case and leaves him destitute? and then says all his rights to his property are adjudicated. Our courts open the penitentiary doors for convicted felons whose constitutional rights are violated. Do these same rules apply to citizens whose civil and constitutional rights are violated?

As this court so aptly noted in *Perez* v. *Brownell*, 356 U.S. 44, 2 L. Ed (2d) 603, 78 S. Ct. 568, that the citizenship is a "Most precious right" and may be forfeited by Congress only by clear exercise of its delegated powers. We submit that there is another "Most precious right" and that is a citizen's opportunity to own and possess property. The framers of our Constitution thought enough of this property right to protect it by the Fifth Amendment.

It must be kept in mind that prior to *Schneider* v. *Rusk* Carl Schmeusser was delineated an enemy within the mean-

ing of Title 50, U.S.C.A., App., Section 2. The fact cannot be ignored that Carl Schmeusser's property was not vested until after he was deprived of his citizenship under a statute now held to be unconstitutional and after President Truman officially declared the cessation of hostilities on December 31, 1946, United States Proclamation, Number 2714, 12 F.R. 1, dated December 31, 1946, U.S. Code Congressional Service 1947, p. 1895. This proclamation in our opinion was the "end of the War" as set out in Title 50, U.S.C.A. App., Sec. 2. The prior determination that Carl Schmeusser should lose his citizenship tainted any subsequent act by the government. The Court of Appeals, Tenth Circuit, and the Counsel for the government have argued that citizenship is not the determining factor but residence. This may be true in other cases, however, in this particular case throughout its history from the time Carl Schmeusser was unconstitutionally deprived of his citizenship he has been considered a national of a designated enemy country. The first paragraph of the Vesting Order 10907 reads as follows:

> "1. That Carl Anton Schmeusser, also known as Carl Schmeusser and as Carl A. Schmeusser, whose last known address is (14a) Donzdorf, Wuerttemberg, Germany, is a resident of Germany and a national of a designated enemy country (Germany)."

The denationalization of Carl Schmeusser was unconstitutional and we cannot with certainty determine what effect this fact had in the administrative determination to issue the vesting order against Carl Schmeusser. However, in reading vesting order 10907 we find a constant reference to Carl Schmeusser as "a national of a designated enemy country." The injustice initially wrought in this case should be corrected. In the case of *System Federation No. 91* v. *Wright*, (1961) 364 U.S. 642, 5 L. Ed. (2d) 349, 353, 81 S. Ct. 368, this court in adjusting inequities stated:

> "Nevertheless the court cannot be required to disregard significant changes in law or facts if it is satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong. United States v. Swift and Co., supra (286 U.S. at 114, 115). A balance must thus be struck between the policies of res judicata and the right of the court to apply modified measures to changed circumstances."

This court granted certiorari in *Polites* v. *United States*, (1960) 364 U.S. 426, 5 L. Ed. (2d) 173, 81 S. Ct. 202, to consider the availability of Rule 60 (b) relief. The effect of the Polites case is that certiorari will be granted to determine if a subsequent decision of this court has altered the law so as to make relief available under Rule 60 (b). In a well reasoned dissent Chief Justice Warren, Justice Brennan, Justice Black, and Justice Douglas asserted that the District Court should have exercised its discretion under Rule 60 (b) to determine whether it is equitable that the judgment of denaturalization should have prospective application.

We know of no other cases exactly like the case at bar; however, we believe with some certainty that there are other persons similarly situated as the petitioner and the questions presented in this petition make it imperative that this court grant certiorari.

PROPOSITION III

There Is a Substantial Constitutional Question Involved, upon Which the Appellant Has a Right to Be Heard, in That the Statute under Which the Appellant's Predecessor in Interest, Carl Schmeusser, Lost His Citizenship Has Been Declared Unconstitutional and Void.

Schmeusser v. *Rusk* (*supra*) and *Bolling* v. *Sharpe*, 347 U.S. 497, 499, 98 L. Ed. 884, 886, 74 S. Ct. 693, held

that while the 5th Amendment contains no equal protection clause it does forbid discrimination, that is so unjustifiable as to be violative of due process.

The sovereign states of this country have been required, without exception, in recent years, to insure and protect the human rights and property rights of all citizens as required by the 14th Amendment of the Constitution. It therefore follows that our Federal Government should be required to protect these same rights by virtue of the 5th Amendment to the Constitution, as they may be violative of due process.

The Court of Appeals, Tenth Circuit, in an elaborate opinion, has indicated that the manifest purpose of the saving provision of Rule 60 (b) is to preserve the power of the courts to entertain remedial actions for relief in circumstances where the old writs, now abolished, would have been available. Though the rule puts an end to the niceties of the writs, it retains their substance, and relief is now available, either by motion or in an independent action, in any situation in which it could have been had by one of those common law remedies. Even before the rules became effective it was recognized that there is always some method of correcting a judgment which becomes unjust by subsequent developments. The original common law method was by a writ of audita querel but the modern remedy is by a proceeding for equitable relief. A similar analysis could be made with regard to the other former remedies. Their substance is preserved and Rule 60 (b) permits relief, by one method or another, whenever relief could have been had in the past. *Oliver* v. *City of Shattuck ex rel. Versluis,* (C.C.A. 10th) 1946, 157 F. (2d) 150, 152, 153.

Despite the clear language of Rule 60 (b), the Supreme Court has held that the common law writ of error

coram nobis remains available in extraordinary cases as a means of attacking criminal convictions. *United States* v. *Morgan,* 346 U.S. 502, 98 L. Ed. 248, 74 S. Ct. 247. Where an action for relief from a judgment is brought in the court that rendered the initial judgment, there is ancillary jurisdiction over the action despite absence of any federal question or diversity of citizenship. *Martina Theater* v. *Schine, etc.,* (C.A. 2) 278 F. (2d) 798.

The Fifth and Fourteenth Amendments to the Constitution of the United States guarantee that no citizen shall be deprived of life, liberty, or property, without due process of law. In the criminal law field we have always corrected our mistakes when we find one of our citizens has been wronged by a court of law which has in fact deprived him of his Constitutional guaranteed liberty.

Citizens who have been sentenced to long prison terms or even death have been returned to society as free men, their final judgments vacated, when it is later discovered that these individuals were in fact not guilty of the crimes which society through "due process of law" had found them guilty. We have even made provisions to compensate these individuals financially, for the great loss they have suffered while being wrongfully incarcerated.

Is the guarantee of property rights as provided in the Fifth and Fourteenth Amendments a lesser guarantee than the rights of Life, Liberty, and Citizenship. We think not. All of these guarantees were surely meant by our forefathers to hold equal status under the law. It therefore logically follows that our conscience and sense of justice should force us to correct those wrongs which have been committed against our fellowman. In this instance one of our citizens has been wrongfully deprived by his government of his real and personal property. Should we

come to the aid of this citizen with the same vigor and dispatch we would one who has wrongfully served a 15 year prison term?

Should we return that property which is rightfully his with the same sense of justice employed in restoring the wrongfully convicted felon's liberty? This government does not engage in sharp practices with its wards. (Black) *Federal Power Comm.* v. *Tuscorora Ind. Nat.*, 362 U.S. 99, 4 L. Ed. (2d) 584, 80 S. Ct. 543.

When the Government becomes the moving party and levels its great powers against the citizen, it should be held to the same standards of fair dealing as we prescribe for other legal contests. To let the Government adopt such lesser ones as suits the convenience of its officers is to start down the totalitarian path. (Douglas) *Anti-Fascist Ref. Comm.* v. *McGrath*, 341 U.S. 123, 95 L. Ed. 817, 71 S. Ct. 624.

In war, we are one people. In making peace, we are one people. In all commercial regulations, we are one and the same people. (Marshall) *Cohens* v. *Virginia*, 6 Wheat. (19 U.S.) 264,413.

This is an action between a citizen and his government in its sovereign capacity. No rights of intervening third parties are involved in this action and therefore no third party could be prejudiced by this court granting certiorari and granting the relief demanded in the complaint.

CONCLUSION

We believe enough has been written to show that the plaintiff should have his constitutional right to present his case in court. We respectfully, but with all the

force and earnestness of which we are capable, urge that the petition for writ of certiorari be granted and the judgment of the trial court and Court of Appeals, Tenth Circuit, be reversed.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

(Filed in the United States Court of Appeals, Tenth Circuit, January 7, 1966, Robert B. Cartwright, Clerk.)
No. 8339—DECEMBER 1965 TERM

OMAR SCHMEUSSER,
Appellant,

v.

NICHOLAS de B. KATZENBACH, Attorney General of the United States of America; DEAN RUSK, as Secretary of State of the United States of America; THE UNITED STATES OF AMERICA; THE GULF OIL CORPORATION, a corporation,
Appellees.

} Appeal From The United States District Court For The Western District of Oklahoma.

Leslie L. Conner and James M. Little, Oklahoma City, Oklahoma (N. Richard Manning, and Conner, Little & Conner, Oklahoma City, Oklahoma, of Counsel, on the Brief), for Appellant.

Florence Wagman Roisman, Attorney, Department of Justice, Washington, D. C. (John W. Douglas, Assistant Attorney General, B. Andrew Potter, United States Attorney, Oklahoma City, Oklahoma; Alan S. Rosenthal, Attorney, Department of Justice, Washington, D. C., with

her on the Brief), for Appellees, Nicholas de B. Katzenbach, Attorney General of the United States of America; Dean Rusk, as Secretary of State of the United States of America; and the United States of America.

James B. Diggs, Oklahoma City, Oklahoma, for Appellee, Gulf Oil Corporation, a corporation.

Before MURRAH, Chief Judge, BREITENSTEIN and SETH, Circuit Judges.

SETH, Circuit Judge.

Appellant sought, as a "successor in interest" of his deceased father, Carl Anton Schmeusser, to recover certain property which had vested in appellees under the Trading with the Enemy Act, 40 Stat. 411, 50 U.S.C. App. § 1. The trial court granted summary judgment for defendants-appellees on the pleadings, and this appeal was taken. Appellant's father had in 1950 also brought an action to recover the property, but judgment was rendered against him. The court made detailed findings of fact in the 1950 suit.

Appellant urges that summary judgment was improper because there were issues of fact and because the loss of citizenship by appellant's father was based upon a statute later held to be unconstitutional. He urges also that the vesting or the failure to recover was brought about in some way by reason of the loss of citizenship, and hence the matter should be reexamined.

The pleadings of the appellant, when interpreted most liberally procedurally and otherwise, thus present a claim

for the return of his father's property because its vesting was related to a loss of citizenship in 1947 under a statute held in 1964 to be unconstitutional.

We will consider these issues and ignore for the moment the question of limitations raised by the Government. When the statute, 50 U.S.C.App. § 1, under which the property was vested in the appellees, and which covers the recovery of vested property, is examined together with the authorities construing it, it is apparent that the determinative factor is residence and not citizenship. Thus if a citizen or non-citizen of the United States was a "resident" of a country with which we were at war, he becomes an "enemy" under the Act and cannot recover the property once vested. Thus the issue as to appellant's father's loss of citizenship under an unconstitutional statute is not important to this suit.

The statute, 50 U.S.C.App. § 2(a), defines an "enemy" to be "any individual" a "resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war . . ." The general term "any individual" is without limitation as to citizenship or in any other respect. Section 2(c) which gives the President discretion to include "other individuals," wherever resident, as enemies is limited to exclude citizens of the United States, as is Section 2 second (c). Thus Section 2(a) must be held to include United States citizens, and if a citizen is found to have been a resident within a country with which we were at war, they become enemies under the Act. The matter of residence is thus the important factor in the case at bar.

The significance of the term "resident" in the statute, and the definition of "enemy" as used in Section 2(a) has been carefully examined in several cases which

arose shortly after the Second World War. In United States v. Krepper, 159 F.2d 958 (3d Cir.), the court held expressly that the term "enemy" was without limitation and thus applied to a citizen of the United States residing in Germany. The issue in the case concerned letters written by the defendant to his wife in Germany. There was a like holding in Salvoni v. Pilson, 181 F.2d 615 (D.C.Cir.), that a United States citizen who resided in Italy during the war was an "enemy" as defined in the Trading with the Enemy Act. Ecker v. Atlantic Refining Co., 222 F.2d 618 (4th Cir.), was a suit to recover vested property and the court held that a naturalized citizen of the United States who returned to Austria was a resident there and an enemy within the Act. See also Feyerabend v. McGrath, 189 F.2d 694 (D.C.Cir.), where the right to sue to recover vested property was limited to non-enemies, and did not include a citizen who had resided in Germany. Guessefeldt v. McGrath, 342 U.S. 308; Kennedy v. Christiani-Onken, 301 F.2d 546 (D.C.Cir.); Kaku Nagano v. Brownell, 212 F.2d 262 (7th Cir.).

What of the residence issue here? As described above, appellant's father in 1950 brought an action in the United States District Court for the Western District of Oklahoma seeking to recover the vested property, but judgment was rendered against him. The court there found as a fact that he was a resident of, and domiciled in Germany from and after December, 1940. The court concluded that he was thus an enemy under Section 2 of the Trading with the Enemy Act, and was barred by Section 9(a) of the Act from recovering the vested property. The court also found he was a citizen of Germany barred under Section 39 of the Act from recovering the property. It also found that he had lost his citizenship and was not entitled to a declaration of nationality as prayed for.

The conclusion as to Section 39 was subsequently held by the Supreme Court in another case to be an incorrect construction of the statute. Guessefeldt v. McGrath, 342 U.S. 308. Also, as indicated above, the statute under which citizenship was lost was later held to be unconstitutional. Schneider v. Rusk, 377 U.S. 163. However the fact remains that a bar to retaining the property was validly based upon the residence of appellant's father, and this was and is a sufficient independent ground under the statute. Appellant asserts that he is the successor in interest to his father. By reason of this privity he is bound by the prior determination of the same issue of residence in the 1950 suit.

The situation as to the citizenship of appellant's father may have changed by events which took place since the vesting, but this does not affect the vesting nor the impediments on bringing an action to regain the property. The matter of the residence of appellant's father cannot change, and it alone is sufficient to preclude the granting of the relief sought by appellant.

In view of the above disposition of the basic issue, it is not necessary to consider the matter of limitations urged by appellees.

There were no issues of fact before the trial court. It was correct in granting summary judgment to appellees.

AFFIRMED.

APPENDIX B

Rule 60 Federal Rules of Civil Procedure

(b) MISTAKES; INADVERTENCE; EXCUSABLE NEGLECT; NEWLY DISCOVERED EVIDENCE; FRAUD, ETC. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: * * * (5) the judgment has been satisfied, released, * * * reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

Title 8, U.S.C.A., Section 1484, Loss of Nationality by Naturalized National

(a) A person who has become a national by naturalization shall lose his nationality by—

(1) having a continuous residence for three years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated, except as provided in section 1485 of this title, whether such residence commenced before or after the effective date of this chapter.

Title 50, U.S.C.A. App., Section 2, Definitions

The word "enemy", as used herein, shall be deemed to mean, for the purposes of such trading and of this Act (sections 1-6 and 7-39 of this Appendix)—

(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, * * *

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1148

OMAR SCHMEUSSER, PETITIONER

v.

NICHOLAS DEB. KATZENBACH ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR RESPONDENTS IN OPPOSITION

On March 24, 1948, the Attorney General, acting pursuant to the Trading with the Enemy Act, 40 Stat. 411, as amended, 50 U.S.C. App. 1, *et seq.*, and executive orders promulgated thereunder, vested in himself certain property of Carl Anton Schmeusser, the father of petitioner. After filing with the Attorney General the necessary notice of claim, Carl Anton Schmeusser brought suit on February 2, 1949, in the District Court for the Western District of Oklahoma, to cancel the vesting order and to recover the property. Determining that Carl Anton Schmeusser was a resident of Germany from and after December

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1940, the district court ruled that he was an "enemy" as defined in Section 2 of the Act, 50 U.S.C. App. 2, and accordingly barred under Section 9(a), 50 U.S.C. App. 9(a). The court also held that he had become a citizen of Germany and was thus additionally barred from recovery by Section 39 of the Act, 50 U.S.C. App. 39. Judgment was entered for the government on July 30, 1951, and no appeal was taken.

On November 19, 1965, petitioner instituted this action, as successor in interest of his father, to vacate the prior judgment and to have judgment entered returning the property to him. He based his claim on the fact that his father had lost his United States citizenship (in 1947) under a statute (8 U.S.C. (1946 ed.) 804, now 8 U.S.C. 1484(a)) which was held unconstitutional in 1964 (see *Schneider* v. *Rusk*, 377 U.S. 163). The district court granted summary judgment for respondents.

The court of appeals affirmed (355 F. 2d 77), holding that, since Carl Anton Schmeusser was resident in Germany at a time when the United States was at war with Germany, he was an "enemy" under Section 2(a) of the Act and could not seek relief under Section 9(a) of the Act for the return of the property irrespective of his citizenship.

This holding is plainly correct. An unbroken line of decisions dating from World War I place it beyond dispute that one who is a resident of enemy territory is barred from recovery under the Act—

as, indeed, the statutory definition in Section 2 makes plain. See, *e.g.*, *Guessefeldt* v. *McGrath*, 342 U.S. 308; *United States* v. *Krepper*, 159 F. 2d 958 (C.A. 3), certiorari denied, 330 U.S. 824; *McGrath* v. *Zander*, 177 F. 2d 649 (C.A. D.C.); *Kahn* v. *Garvan*, 263 Fed. 909 (S.D. N.Y.). As stated in the *Krepper* case, 159 F. 2d at 966:

> In matters involving property rights of American citizens residing in a country at war with the United States, it has been consistently held that the term "individual resident" in a statute included as enemies individual residents within the territory of a nation with which the United States was at war and, therefore, applied to citizens of the United States as well as aliens under the provisions of "Trading with the Enemy Act", Section 2. * * *

It is therefore immaterial for purposes of the instant case whether petitioner's father be regarded as a German citizen or an American citizen. The fact of his enemy residence, established by the judg-

ment of the district court in 1951, is alone dispositive and there can accordingly be no basis for reopening.[1]

The petition should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

APRIL 1966.

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[1] We note parenthetically that insofar as the district court, in the father's original suit, ruled alternatively that the father was barred by his German citizenship, it was apparent as early as 1952—13 years before the instant suit was brought—that this aspect of its decision was erroneous. In the *Guessefeldt* case, *supra*, this Court decided that German citizenship would not bar one who was a nonresident of enemy territory.

Moreover, there are additional grounds for refusing to set aside the original judgment. Rule 60(b)(5), (6), F.R. Civ. P., upon which petitioner relies, is not ordinarily available to an applicant who has voluntarily abandoned his right to appeal. *Ackerman* v. *United States*, 340 U.S. 193; *Polites* v. *United States*, 364 U.S. 426, 431–432. Here, petitioner's father, who was represented by counsel, failed to take an appeal from the original judgment, and petitioner has not offered sufficient justification for that omission. See, *e.g.*, *Ackermann* v. *United States*, *supra*. In addition, the fourteen years which elapsed between the entry of the original decision and the institution of this case is a sufficient basis for not disturbing the judgment. See 7 Moore's *Federal Practice* (2d ed.), ¶ 60.27[3].

U.S. GOVERNMENT PRINTING OFFICE:1966